



U.S. Department of Justice
Environment and Natural Resources Division

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TO: ENRD Section Chiefs and Deputy Section Chiefs

FROM: Jeffrey Bossert Clark, Assistant Attorney General (ENRD)

SUBJECT: Enforcement Principles and Priorities

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As the Environment and Natural Resources Division (ENRD) pursues its assigned missions, robust enforcement of our nation's environmental laws remains one of its highest priorities. This memorandum summarizes principles that guide the Division's civil and criminal enforcement work. It also describes a number of the Division's recent enforcement priorities. When engaged in criminal and civil enforcement, it is important that ENRD continue in always striving to enhance its fair and impartial application of the law. We must recognize our place in the constitutional structure, as delegates of the President's and the Attorney General's authority to faithfully execute the laws enacted by Congress. To that end, this memorandum collects and reflects recent policies and guidance within ENRD, from around the Department, and in orders from the President for the continued just implementation of these responsibilities and for ensuring due process to the citizens of the United States who must have fair notice of the laws they are expected to obey.

This memorandum is not a comprehensive recitation of all considerations that go into the exercise of our Division's enforcement discretion. This summary should nevertheless guide and supplement ENRD attorneys' work as they continue to enforce the nation's environmental laws.¹ You should apply these principles when exercising enforcement discretion.

¹ This memorandum provides guidance to ENRD attorneys and is not intended to be, and may not be, relied upon to create any rights, substantive or procedural, enforceable at law by any party in any civil or criminal matter. This memorandum is administered by the Division as a matter of enforcement discretion, and its provisions are not intended to be applied by a court.

ENRD ENFORCEMENT PRINCIPLES

Enforcement Principle #1

Promote Fairness, Adhere to the Impartial Rule of Law, and Ensure Due Process.

Fairness must inform all that we do. After all, the whole concept of our American [C]onstitution was to establish a Government that could serve the common good while checking government power [in order] to protect individual liberty. And that is the Constitution we are sworn to support and defend. As you carry out your mission, I rely on you to lead wisely, hold those who injure the public accountable, and zealously represent the United States in court, while at the same time maintaining unshakable confidence in the rule of law and justice for all. That is your charge, and I know that you embrace it willingly, and well.

- Former Attorney General Barr.²

As is implicit in the above charge of former Attorney General Barr, federal laws, including environmental laws, can only be effective if our nation adheres faithfully to the Constitution and fundamental principles such as fairness, adherence to the rule of law, and due process.³ ENRD is fortunate to have exceptional attorneys and professional staff. They conduct their enforcement duties with integrity, diligence, and prudence, all of which are crucial to ensuring the rule of law.

A. Enforcement Actions Should Be Premised on Violations of Statutes and Regulations, and Not Legislative History, Agency Guidance Documents, or Retroactive Application of Contemporary Duties of Care.

The imperative to advance and maintain the objective application of the rule of law should always direct ENRD's work. Accordingly, when making enforcement decisions, ENRD attorneys must continue to file only complaints and indictments that are well-founded in existing law and that seek relief authorized by such law. ENRD enforcement actions should not be premised on liability theories that lack foundation in existing law. This does not foreclose application of existing law and principles to new technology, techniques, or circumstances. Rather, it means that civil or criminal charges for violations of federal law must be based on the text of federal statutes and

² Remarks of William P. Barr, Attorney General of the United States, U.S. Attorneys' Conference, Washington, D.C. (June 26, 2019).

³ The Division has long recognized the important connection between environmental enforcement and the rule of law. See John C. Cruden & Bruce S. Gelber, *Federal Civil Environmental Enforcement: Process, Actors, and Trends*, ABA Natural Resources & Environment, Vol. 4, No. 4 at 18 (Spring 2004) ("Environmental enforcement and dedication to the rule of law are necessary to ensure the protection and improvement of human health and the environment.").

regulations, and not, for example, the legislative history (or dicta therein) or agency guidance documents.⁴

Interpretation to determine if existing laws or regulations preclude investigated conduct begins with the text. As appropriate, attorneys should then look to both the context and structural terms of a statute, and apply traditional canons of statutory interpretation.⁵ Enforcement actions should not be based on general statements of purpose or interpretations dependent upon legislative history, particularly to expand their scope. Much has been written about the deficiencies of legislative history, including that it is not what all voting members of Congress necessarily considered or consented to before voting on the bill; indeed, some legislative history will reflect the views of only one or a limited number of lawmakers when legislative colleagues were not, in fact, persuaded to modify statutory text. *See, e.g., Koons Buick Pontiac GMC Inc. v. Nigh*, 543 U.S. 50, 72 (2004) (Scalia, J., dissenting) (“I have often criticized the Court’s use of legislative history because it lends itself to a kind of ventriloquism. The Congressional Record or committee reports are used to make words appear to come from Congress’s mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists).”)

Nor should enforcement actions be premised on agency guidance documents. On October 9, 2019, the President issued an executive order announcing that “it is the policy of the executive branch, to the extent consistent with the applicable law, to require that agencies treat guidance documents as non-binding both in law and practice, except as incorporated into a contract.” Exec. Order No. 13,891 of Oct. 9, 2019, 84 Fed. Reg. 55235, § 1 (Oct. 15, 2019). On that same day, the President issued another order announcing that “no person should be subjected to a civil administrative enforcement action or adjudication absent prior public notice of both the enforcing agency’s jurisdiction over particular conduct and the legal standards applicable to that conduct.” Exec. Order No. 13,892 of Oct. 9, 2019, 84 Fed. Reg. 55,239, § 1 (Oct. 15, 2019). The order generally prohibits the use of guidance documents to impose new standards of conduct or to exercise jurisdiction over a new area. It required that agencies publish their legal interpretations to avoid unfairly surprising regulated persons. *See* 84 Fed. Reg. at 55240-41, §§ 3-9.

On May 19, 2020, the President issued Executive Order 13,924. This announced “the policy of the United States to combat the economic consequences of COVID-19 with the same vigor and resourcefulness with which the fight against COVID-19 itself has been waged.” Exec. Order No. 13,924 of May 19, 2020, 85 Fed. Reg. 31,353, 31,353 § 1 (May 22, 2020). Executive Order 13,924 builds upon Executive Orders 13,891 and 13,892. It requires agencies to “afford businesses, especially small businesses, the confidence they need to re-open, among other things, by recognizing the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances; and by committing to fairness in administrative enforcement and adjudication.” *Id.* Executive Order 13,924 identifies several principles of fairness that agency enforcement officials and adjudicators must follow. Those include that administrative enforcement must be prompt and fair, free of coercion and unfair surprise, and that “liability may be imposed only

⁴ *See* Justice Manual (“JM”) 1-20.000 *et seq.*

⁵ *See Reading Law: The Interpretation of Legal Texts* by the late Justice Scalia and Bryan Garner.

for violations of statutes or duly issued regulations, after notice and an opportunity to respond.” 85 Fed. Reg. at 31,355 § 6.

On their face, the policies announced in these orders do not control civil or criminal actions or investigations by the Department of Justice. *See* 84 Fed. Reg. 55238, § 7(d)(ii); 84 Fed. Reg. at 55242, § 11(d)(ii); 85 Fed. Reg. at 31,354, § 2. However, the policies underlying the orders derive from fundamental notions of due process that should also guide the exercise of prosecutorial discretion in cases before ENRD. The Justice Manual (JM), too, prohibits Department components from issuing guidance documents that effectively bind the public without going through notice and comment rulemaking. JM 1-19.000; *see also Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015) (interpretative rules and interpretations thereof lack the force and effect of law).⁶ To avoid unfairly surprising the regulated community, civil and criminal litigating components “should not treat a party’s noncompliance with a guidance document as itself a violation of applicable statutes or regulations.” JM 1-20.100. “Instead, the Department must establish a violation by reference to statutes and regulations.” *Id.*; *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (agencies enforce regulations and not the interpretations thereof).

Although the Department may rely on agency guidance documents for certain purposes other than asserting binding requirements that do not exist by statute or regulation, these exceptions are necessarily limited so as not to swallow the rule itself. JM 1-20.200. For instance, the Department may use awareness of a guidance document as evidence that the party had the requisite scienter, notice, or knowledge of the law to be liable in a particular action, but only where a guidance document describes the relevant law. JM 1-20.201. The Department may use a guidance document as probative evidence that a party has failed to satisfy professional or industry standards or practices relating to applicable statutory or regulatory requirements. JM 1-20.202. This exception applies more broadly, for example, in the healthcare arena, where guidance documents are relevant evidence of violations of the principal requirement that procedures billed be medically “reasonable and necessary.” *E.g.*, 42 U.S.C. § 1395y(a)(1)(A); 42 U.S.C. § 1396 *et seq.*; 42 C.F.R. § 410.50.

Regardless, enforcement actions should not be premised on projecting current, aspirational, or benefit-of-hindsight duties of care backward to judge past conduct. This is what happens when guidance documents that have not undergone notice and comment are cited as a basis for legal violations.

The reasons for the prohibition on the use of guidance documents to establish liability are fundamentally ones of due process and transparency. *See* 84 Fed. Reg. 55235, § 1 (“The rule of law requires transparency.”). The purpose of due process is to ensure fairness in all legal matters (both civil and criminal) and to prevent prejudicial or unequal treatment in the justice system. Traditional concepts of due process mandate that “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see also Johnson v. United States*, 576 U.S. 591, 595 (2015) (“the Government

⁶ *See also* DOJ Press Release No. 18-96, Associate Attorney General Brand Announces End to Use of Civil Enforcement Authority to Enforce Agency Guidance Documents (Jan. 25, 2018), *available at* <https://www.justice.gov/opa/pr/associate-attorney-general-brand-announces-end-use-civil-enforcement-authority-enforce-agency>.

violates [the guarantee of due process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes"); *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) ("the due process clause prevents [deference to an agency interpretation] from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires"); *Satellite Broad. Co. v. F.C.C.*, 824 F.2d 1, 3-4 (D.C. Cir. 1987); *General Electric Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995). Agency guidance documents often do not provide the requisite fair notice and transparency. That is in part because, generally, the Administrative Procedure Act (APA) requires agencies to use, in most cases, notice-and-comment rulemaking when creating rights or obligations binding on members of the public or the agency. See 5 U.S.C. § 553. Thus, agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications,⁷ and only after appropriate process, "except as expressly authorized by law or as expressly incorporated into a contract." 84 Fed. Reg. 55240, § 3. Moreover, the Freedom of Information Act amended the APA to require that generally agencies must publish in the Federal Register their substantive rules of general applicability, statements of general policy, and interpretations of law that are generally applicable. See 84 Fed. Reg. at 55239, § 1 (citing 5 U.S.C. § 552(a)(1)(D)).

Thus, concern for ensuring due process, fair notice, and transparency extends beyond the prohibition on the use of guidance documents. In the context of criminal enforcement, sometimes a statute and regulation may itself fail "to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson*, 576 U.S. at 595. In such criminal cases, courts apply the "rule of lenity," which requires courts to resolve ambiguity in criminal laws in favor of defendants. See *United States v. Santos*, 553 U.S. 507, 514 (2008) ("[T]he tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). Of course, the rule of lenity applies only where "grievous ambiguity" remains following the application of the traditional tools of statutory construction. See *Ocasio v. United States*, 136 S. Ct. 1423, 1434 n.8 (2016). But simply because arguments can be made opposing the rule of lenity in a particular case does not mean that they should be made. Consistent with the spirit underlying OMB's guidance for implementing Executive Order 13,924, which encourages agencies to apply the rule of lenity in administrative enforcement proceedings, M-20-31 at 2,⁸ overly technical arguments about the rule of lenity should be avoided in ENRD cases. ENRD attorneys should similarly weigh the principles of fairness and due process underlying the rule of lenity when considering the application of ambiguous language.

⁷ As noted herein, ENRD attorneys must be careful not to conduct regulation-by-litigation.

⁸ See Memorandum M-20-31, *Implementation of Section 6 of Executive Order 13924* (Aug. 31, 2020), available at <https://www.whitehouse.gov/wp-content/uploads/2020/08/M-20-31.pdf>. Of particular note, the best practices encourage agencies to "consider applying the rule of lenity in administrative investigations, enforcement actions, and adjudication by reading genuine statutory or regulatory ambiguities related to administrative violations and penalties in favor of the targeted party in enforcement." M-20-31 at 2.

B. Enforcement Actions Should Not Be Used To Implement Regulation-by-Litigation.

For similar reasons, civil and criminal enforcement actions should be focused on remedying or punishing violations of federal laws, and not on creating new standards or duties. In other words, ENRD attorneys should be wary of efforts to engage in regulation-by-litigation.

Regulation-by-litigation is not the same as an enforcement action by a regulator, which aims to bring a firm or individual into compliance with existing regulations. Rather, regulation-by-litigation occurs when a regulator brings suit, usually against a large portion of an industry, to compel the regulated entities to agree to comply with as yet unwritten standards, usually through settlements. These settlements then look like the outcome of a rulemaking: a set of detailed rules that constrain future behavior. Yet rather than impose these detailed regulations by notice-and-comment, the regulator proceeds on a theory that regulated parties as a whole should be applying these, as of yet unwritten, standards.

Regulation-by-litigation is problematic for many reasons. Most notable is the relative lack of transparency and due process provided when litigation displaces traditional APA notice and comment rulemaking. Unlike in traditional rulemakings, regulation-by-litigation affords neither the regulated community nor the general public the procedural protections conferred by the APA. Regulation-by-litigation frees agencies from the requirements of proposing a rule, seeking public comment on the proposed rule, and responding to those comments in the final rule. This freedom, in turn, liberates agencies of political accountability for their actions and is an invitation to collusion and rent-seeking behavior among regulated parties and NGOs.

Regulation-by-litigation also cuts the public out of the rulemaking process. In traditional APA rulemaking, any citizen can comment on a rule and challenge an agency's proposal. But regulation-by-litigation can sometimes allow only the agency, the regulated community members being sued, and those granted special permission by the court to comment on a rule and thereby challenge the agency. In such situations, only a subset of interested parties thus has the opportunity to influence the agency's decision. But public comment has value even if the comments do not influence the agency. In traditional rulemaking, an agency must pay at least some attention to the views of all of the public at-large. By contrast, regulation-by-litigation shuts out the general public, frustrating principles of transparency and effective government.

C. Enforcement Actions Should Not Improperly Single Out Any Particular Person, Industry, Group, or Interest—For Liability or Remedy.

As we seek to advance the rule of law through our enforcement work, we must continue to do so impartially, without special treatment for, or animus against, any particular person, industry, group, or interest. Remember the words of former Attorney General Robert Jackson, who observed in a 1940 speech that:⁹

⁹ Attorney General William P. Barr Delivers Opening Remarks at the U.S. Attorney's Conference (June 26, 2019), available at <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-opening-remarks-us-attorneys-conference>.

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.¹⁰

We must be careful to not single out, or overlook, a particular target, industry or economic sector for enforcement based on appropriate enforcement criteria.

Related to these principles, attorneys should also pay due respect to the corporate form, and of distinctions between separate entities held by larger corporation. The corporate form and its analogues have long been accepted by nations, states, and our federal government to allow investors and owners to limit their liability.¹¹ To be sure, the corporate form can be abused. But distinct corporate entities, held by a common parent, may also have different managers, different lines of business, and different responsibilities and histories of complying with our laws to protect human health and the environment.

When dealing with affiliated entities, ENRD should give due respect to the policy judgment of lawmakers to create and maintain the corporate form. Thus, absent evidence or reason to believe that corporate formalities have been abused or disregarded and should be pierced, either formally, or because of the cross-cutting conduct of individuals who may be operating across corporate lines within an organization, distinct corporate forms and entities of an organization should be acknowledged and respected, and consideration should be given to whether the financial assets, compliance history, and conduct of one subsidiary are relevant or appropriate to consider when reviewing that of other affiliated entities.

¹⁰ Robert H. Jackson, Attorney General, *The Federal Prosecutor* (Apr. 1, 1940), available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>.

¹¹ See, e.g., *U.S. for Use & Benefit of Glob. Bldg. Supply, Inc. v. WNH Ltd. P'ship*, 995 F.2d 515, 520 (4th Cir. 1993) ("Corporate forms exist to limit liability, and courts are reluctant to set them aside simply because they've done so.").

D. Settlements Should Seek Only Remedies That Are Consistent with Applicable Statutory Authorities and Controlling Law.

Settlement of enforcement actions has long been encouraged as a matter of Department policy.¹² Yet, in settling cases, ENRD cases should seek to impose *only* remedies that are consistent with applicable statutory authorities and controlling law. For example, an important constraint on settlement authority is the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b), which requires that all civil and criminal fines be deposited in the United States Treasury, absent congressional direction to the contrary. *See also* 31 U.S.C. § 1341(a)(1)(A). ENRD will also adhere to the June 5, 2017 memorandum from the Attorney General entitled “Prohibition on Settlement Payments to Third Parties.” Those prohibitions are now reflected in Departmental regulations, 28 C.F.R. § 50.28, and apply to, for example, the use of Supplemental Environmental Projects (SEPs) in settlements. By their nature and design, SEPs usually provide in-kind payments or other benefits to third parties in exchange for a reduction in monetary penalties payable to the Treasury, which the Miscellaneous Receipts Act forbids, except where Congress has specifically provided otherwise. *See Memorandum, Supplemental Environmental Projects (“SEPs”) in Civil Settlements with Private Defendants* (Mar. 12, 2020), available at <https://www.justice.gov/enrd/page/file/1257901/download>. Mitigation, by contrast, can be an important remedy in environmental cases. Nevertheless, its focus is on restoration, not punishment. Therefore, mitigation must be calculated to address the extent of *actual* harm caused by the respondent or defendant’s alleged behavior, and may not be used to obtain relief that does not directly remedy the injury to the environment caused by the violation.

* * *

In sum, considerations of due process should always be at the forefront of ENRD’s enforcement decisions. A commitment to the rule of law also means that our attorneys must remain mindful of, and do our utmost to respect, the constitutional protections for our citizens, and to the principle of doing justice.

**Enforcement Principle #2
Even Where A Guilty Mind Is Not Required, It Is Still Relevant.**

Certain statutes ENRD is responsible for enforcing impose strict liability for certain types of offenses (in particular, permit violations), as well as higher penalties when the conduct is knowing or willful. At common law, strict liability was reserved for exceptionally dangerous activities and the much more limited environmental tort of nuisance. Congress’s expansion of the scope of our laws protecting the environment and natural resources, however, does not negate traditional principles of law as guideposts for our exercise of prosecutorial discretion. To the contrary, the expansion of potential liability *increases* the need for enforcement officials to make wise and just decisions about how to allocate scarce prosecutorial resources.

¹² *See* Executive Order 12988, 61 Fed. Reg. 4729 (Feb. 7, 1996).

Consequently, those offenses that do not involve intentional, knowing, or willful wrongdoing may be more appropriate for administrative enforcement or compliance assistance than for judicial enforcement. In accepting referrals from our partner agencies, and in making decisions about remedy and settlement demands, we should be careful to allocate our limited enforcement resources to cases that merit judicial enforcement, including those that are consequential or that involve identifiable culpability. Congress has elevated the duties of those engaged in activities that may pollute our environment and eased the burden of enforcers by sometimes imposing strict liability. But even then, the degree of culpability—from specific intent to the absence of scienter—should be considered when prioritizing matters for enforcement and in selecting remedies for enforcement. Another relevant consideration in that determination of culpability has further long been a target's cooperation with investigators or agencies.

Enforcement Principle #3

Exercise Pragmatic Decision-Making to Achieve Just and Consistent Results.

The sound exercise of enforcement discretion is a defining responsibility for ENRD, and is one that will be governed by the law, the facts of the case, and common sense.¹³ Moreover, in civil enforcement, it also governed by principles coordination and collaboration articulated in a memorandum of understanding with EPA, the Justice Manual and Office of Legal Counsel descriptions of the role of client agencies. Decisions by ENRD attorneys to bring federal cases must also spring from an independent and searching review of the facts and the law and a sound and careful consideration of relevant factors, including the strength of the evidence; the basis for assertion of federal jurisdiction; the nature, importance, and impact of the violations; the environmental and law enforcement benefits expected to be gained through enforcement action; the economic benefits that the counterparty derived from noncompliance with the law; and the objectives and priorities of the referring agency. With regard to evidence, environmental cases often involve complex scientific or technical issues. In such contexts, ENRD attorneys must be careful to rely upon sound scientific data and evidence.

Even though many cases are complex, ENRD enforcement attorneys should be mindful of pragmatic concerns. And when choosing which violations of law to pursue and how to pursue those violations, our attorneys should weigh whether the contemplated enforcement action is calculated to achieve a just result.

¹³ In the context of criminal prosecutions, former Attorney General Robert Jackson observed that

One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

Available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>. Similar sentiments should guide our work in the civil enforcement context.

Congress has imposed certain limits on the fines, penalties, and other relief that can be assessed in a number of the environmental statutes. ENRD should not use excessive theoretical sanctions as a means to pressure targets to accept unrealistic or excessive penalty numbers or to concede claims and defenses. Instead, demands should be developed with due consideration of prior precedent—that is, both judicial and Departmental precedents in the prior resolution of similar matters—as modified based on such things as traditional factors relevant to prosecutorial discretion which vary from case to case, the passage of time, and the need to ensure adequate general deterrence.

A central feature of our pursuit of justice should be consistency. As the only component of the Department responsible for the nationwide enforcement of the environmental and natural resources laws, ENRD has a duty to bring that nationwide perspective to the cases it handles, that are referred by regional agencies, or which our partners within U.S. Attorneys' Offices pursue. In short, ENRD should endeavor to treat similar cases across the country similarly when pursuing trial judgments or settlements. When faced with a new situation, particularly egregious conduct, recalcitrance, or a change in the priorities of our partner agencies, it is often appropriate to seek an upward adjustment of penalty demands from prior actions. We must ensure that fines and penalties achieve the deterrent objective. The converse, however, is equally important. ENRD attorneys should recognize where fines and penalties sought or obtained in other enforcement actions were based on greater culpability, damage to the environment, or more economically beneficial conduct to the violator than the present case. Justice requires that there is not always an upward ratchet. Instead, ENRD attorneys should make fair and appropriate downward departures to the fines, penalties, and other relief sought in cases where benchmarks to other cases and precedents reflect the reasonableness of doing so.

The pursuit of consistency should also include how ENRD assesses claims of an inability to pay an otherwise appropriate amount to resolve a criminal or civil case. This means consistency both within ENRD and across the Department. The Department's Criminal Division¹⁴ and Civil Division¹⁵ have each recently issued memoranda articulating frameworks for analyzing such assertions. Pending development of guidance specific to ENRD, ENRD's criminal and civil enforcement attorneys should look to the Criminal Division and Civil Division memoranda, respectively, as well as any specific guidance from the partnering agency. Unless inconsistent with the laws or regulations ENRD is enforcing or otherwise inappropriate, ENRD should presumptively apply these frameworks as well. To that end, the burden of demonstrating an inability to pay remains on the entity making that assertion. Relevant factors that ENRD attorneys should consider include, but are not limited to: whether the entity disclosed the financial information necessary to conduct the analysis; the entity's current financial condition; whether the entity has access to alternative

¹⁴ Brian A. Benczkowski, Assistant Attorney General (Crim. Div.), "Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty" (Oct. 8, 2019), *available at* <https://www.justice.gov/opa/speech/file/1207576/download>.

¹⁵ Ethan P. Davis, Acting Assistant Attorney General (Civ. Div.), "Assessing an Entity's Assertion of an Inability to Pay" (Sept. 4, 2020), *available at* <https://www.justice.gov/civil/page/file/1313361/download>.

sources of capital; the timing of potential payments; the tax deductibility of payments; contingency arrangements; the collateral consequences of payment; and whether a third party might share in the liability.

In short, ENRD must not strive to always make *this* case be bigger than the *last* case. As former Attorney General Barr expressed, “doing justice is ultimately a matter of achieving just results.”¹⁶ The importance of these words is so fundamental that a similar sentiment by former Solicitor General Frederick William Lehman is carved on the walls of the anteroom to the Attorney General’s personal office: “The United States wins its point whenever justice is done its citizens in the courts.” To achieve justice for our citizens in court requires us to carefully consider the societal benefits, costs, and relative fairness and consistency of our enforcement actions.

Enforcement Principle #4 **Employ the Full Range of Enforcement Tools.**

When federal enforcement is warranted, we must pursue it vigorously and in a manner that is proportionate to the violation of law. In the environmental statutes that ENRD enforces, Congress has given federal agencies (and by extension, the Department of Justice) a wide range of options to enforce the law. Depending on the statute, the options for addressing violations may include any (or all) of the following: formal or informal administrative action by the agency (for example, participation in compliance assistance programs, or issuance of a notice of violation, compliance order, or administrative complaint); civil judicial enforcement; or criminal prosecution where circumstances warrant.

Administrative Enforcement and Compliance Assistance: When compliance issues arise, administrative agencies such as EPA may be able to resolve some issues informally through the compliance assistance programs and self-audit and self-reporting policies that they administer. While ENRD’s role is distinct from that of the regulatory agencies, ENRD supports the use of such programs. Indeed, these agency-led, informal policies for resolving compliance issues support ENRD enforcement interests. Regulated entities have an incentive to participate in such programs to expeditiously resolve their compliance issues directly with the agency, thus avoiding a referral to ENRD in the first place. To the extent requested by the agencies, ENRD attorneys should support efforts to achieve early resolution of matters.

If the agency’s compliance assistance efforts prove unsuccessful, the agency may use more formal administrative tools short of seeking judicial enforcement. These include issuing, in a manner consistent with law, administrative compliance orders or initiating a formal administrative action with an administrative law judge (including actions for administrative penalties). This range of enforcement options promotes the efficient use of federal resources and can expedite the resolution of compliance issues. Again, ENRD supports the use of these administrative tools, but only

¹⁶ Remarks of William P. Barr, Attorney General of the United States, The George Washington University National Law Center Commencement, Washington, D.C. (May 31, 1992), *available at* <https://www.justice.gov/ag/speeches-4>.

to the extent those tools comply with Executive Orders 13,891, 13,892, and 13,924, as well as other laws and policies requiring transparency and fairness in administrative enforcement and adjudication.

Judicial Civil Enforcement: When an agency is unable to address adequately a violation or determines that judicial enforcement is otherwise appropriate, it will refer the matter to ENRD for judicial enforcement. Determining the form of enforcement—civil or criminal—must be undertaken carefully. The vast majority of enforcement cases referred to ENRD are best addressed through civil enforcement. In general, the goals of ENRD's civil enforcement cases are: to require violators to come into compliance with the law and take measures to abate ongoing violations; to achieve cleanup or to restore natural resources after damage arising from the unlawful release of hazardous substances and other materials into the environment; to compensate the government for its cleanup costs or for injury to natural resources; to remove economic benefits obtained through noncompliance; to remedy harm to public health or the environment caused by unlawful conduct; and to punish and deter violations through civil penalties.

Notwithstanding the agency's referral of a matter for civil enforcement, in accordance with ENRD policies and practice, as well as Executive Order 12,988 on Civil Justice Reform (1996), ENRD typically will file a civil complaint only after it has provided a prospective defendant with an opportunity to resolve its violation of law (or its debt to the federal government arising from an environmental obligation) before commencement of a civil action.¹⁷

Once ENRD receives an agency referral, ENRD attorneys should seek to timely and efficiently resolve the matter, either through settlement or through a litigated judgment. Timely and efficient resolution of civil enforcement actions vindicates the rule of law, creates tangible health and environmental benefits, conserves limited federal law enforcement resources, and allows defendants to resolve past violations of the law and to come more rapidly into compliance to avoid future violations. It provides a salutary measure of closure for all concerned—harmed parties, the responsible party, and governmental personnel.

Resolution of a civil judicial enforcement matter through settlement should consider several aspects of the defendant's pre-filing conduct, including: its degree of cooperation with the agency (including any self-reporting or self-auditing); its efforts to come into compliance; its participation in an agency compliance assistance program; and its environmental compliance history, and other factors identified in applicable penalty policies of the referring agency. If a matter can be settled pre-filing, then the settlement will be lodged with the court, and, where appropriate, made available for public comment, simultaneously with the filing of the civil complaint. If, following public comment, the settlement is entered by the court, then the defendant need not answer the complaint and the matter will be resolved with a minimum of litigation effort and resources.

Judicial Criminal Enforcement. While less common, criminal enforcement of federal environmental laws is a key component to the overall enforcement scheme. The imposition of criminal

¹⁷ On occasion, ENRD may return a referral for civil judicial enforcement to the referring agency. ENRD thoroughly reviews such referrals and, following such review, may determine that the matter is more appropriately addressed through administrative, as opposed to judicial, enforcement.

sanctions serves a vital deterrent function, expresses society's condemnation of the underlying conduct, and demonstrates the seriousness of environmental crimes. Criminal prosecution also may be needed to secure restitution for victims or to recover assets that represent proceeds of, or were used to facilitate, a federal offense.

Criminal prosecution (as opposed to civil enforcement) is most appropriate where the facts show a requisite criminal intent and the conduct creates a serious danger or risk of danger, has severe environmental effects, disregards human safety or the environment, involves dishonest or false conduct that undermines the statutory scheme, or involves repetitive significant violations notwithstanding administrative and civil enforcement efforts to obtain compliance. In other words, criminal enforcement is most appropriate for *malum in se* (as opposed to *malum prohibitum*) offenses.

In criminal cases, the Justice Manual provides substantial guidance for the reasoned exercise of federal prosecutorial discretion. See JM 9-27.230 (addressing prosecutorial discretion generally) and JM 9-28.300 (addressing prosecutorial discretion with respect to business organizations). Among the factors that inform such discretion are a defendant's degree of cooperation, the extent to which a defendant makes voluntary disclosures, the existence of and quality of a defendant's compliance program, and a defendant's subsequent efforts to comply with the law. As set out in ENRD guidance in July 1991, these specific mitigating factors are and will continue to be important factors in the decision whether to pursue criminal enforcement.

Once the decision to prosecute has been made, the Justice Manual instructs the government generally to charge and pursue the *most* serious, readily provable offenses. See JM 9-27.300. At the same time, however, the Justice Manual prohibits prosecutors from piling on. See JM 9-27.320. "It is important to the fair and efficient administration of justice in the federal system that the government bring as few charges as are necessary to ensure that justice is done." *Id.* Generally, "additional charges may be brought: (1) when necessary adequately to reflect the nature and full extent of the criminal conduct involved; (2) when necessary to provide the basis for an appropriate sentence under all the circumstances of the case; or (3) when an additional charge or charges would significantly strengthen the case against the defendant or a codefendant." *Id.*

Enforcement Principle #5 Coordinate with Agencies.

Agencies entrusted with administering programs created by Congress generally will identify the areas of law warranting the attention of civil enforcement and initially play a lead role in developing potential targets for civil enforcement. Historically, ENRD enforcement priorities have closely followed priorities established by its referring agencies who are conducting investigations, and we will continue to follow this practice. ENRD will support agency priorities and generally will look to the agency with respect to science and technical matters. But ENRD is also responsible for deciding whether the United States should pursue a given case and, if so, on what terms.¹⁸ As

¹⁸ See Assistant Attorney General for the Office of Legal Counsel Theodore Olson, OLC Memorandum for the Attorney General, The Attorney General's Role as Chief Litigator for the United States (Jan. 4, 1982) ("[T]he Attorney General is better able to coordinate the legal involvements

such, before filing a complaint, ENRD will undertake an independent and careful review of an agency request for judicial enforcement to satisfy itself that the proposed action is well-founded in law and fact and is consistent with Department and agency policies, as well as broader government interests.¹⁹ Once an action is initiated, ENRD lawyers should continue to ensure that all relevant agencies are kept apprised of progress in the case.

As part of this coordination, ENRD should duly consider any penalty policies of a referring agency. This, too, is important for affording due process to regulated entities, promoting transparency, and enhancing the consistent application of the law. The Department is not bound by the penalty policies issued by referring agencies. ENRD attorneys thus retain discretion to depart from those policies in cases where justified by case-specific considerations. Nevertheless, when considering the amount of fines, penalties, or other remedy to be pursued, ENRD attorneys should give due consideration to agency penalty policies. It should strive to maintain consistency therewith, unless deviation upward or downward is warranted by the facts and circumstances of particular cases.

Enforcement Principle #6 **Protect Taxpayers and the Public Fisc.**

ENRD plays an important role in recovering taxpayer dollars expended as a result of environmental incidents or concerns, such as in Superfund and Oil Pollution Act cost recovery actions. Similarly, ENRD is responsible for recovering damages arising from injuries to natural resources that are to be restored, pursuant to law, by federal and state natural resource trustees. Over the past 20 years, ENRD has recovered approximately \$30 billion in civil cases on behalf of the federal government and another \$8.7 billion in criminal cases. Across all of our enforcement work, our attorneys should remain mindful of the need to be fiscally responsible and litigate in a cost-effective manner, consistent with the objectives of the action, court orders, and the requirements of the applicable Federal Rules.

of each 'client' agency with those of other 'client' agencies, as well as with the broader legal interests of the United States overall. Yet, while the 'client' agencies may be involved, to varying degrees, in carrying out the litigation responsibilities necessary to assist the Attorney General in representing the agency's particular interests, it is essential that the Attorney General not relinquish his supervisory authority over the agency's litigation functions, for the Attorney General alone is obligated to represent the broader interests of the Executive.").

¹⁹ *Id.* (stating that the Department "will accommodate the agency's policy judgments to the greatest extent possible without compromising the law, or broader national policy considerations"); *see also* Memorandum of Understanding between the Department of Justice and the Environmental Protection Agency (June 15, 1977), providing that the Attorney General shall retain control over the conduct of all cases to which EPA is a party, while also promoting a "close and cooperative relationship" between the Justice Department and EPA.

Enforcement Principle #7
Collaborate with United States Attorneys' Offices.

It is critical for ENRD to maintain, and where possible enhance, close coordination and consultation with United States Attorneys' Offices (USAOs). ENRD has productively collaborated or partnered with USAOs in all aspects of its docket, including civil and criminal enforcement. To foster this beneficial relationship, ENRD attorneys coordinate with the relevant USAOs in accordance with applicable practices and procedures reflected in Division directives and the Justice Manual. Often, the expertise of ENRD attorneys is a valuable resource for AUSAs handling cases within ENRD's purview, including through direct training of AUSAs and training at the National Advocacy Center. Likewise, ENRD values the insights and expertise of AUSAs.

In civil cases, ENRD should continue to consider whether, in accord with applicable requirements, a relevant USAO could be the appropriate arm of the Department to handle a particular enforcement action. To the extent consistent with Department and ENRD directives, ENRD will look for opportunities to delegate cases to a USAO where the USAO indicates that it has a particular interest in, and resources available to handle, those cases. To this end, ENRD should engage proactively with USAOs and, where appropriate, arrange for enforcement cases to be handled by, or in conjunction with, the districts.

In criminal cases, pursuant to JM 5-11.104, USAOs are responsible for investigating and prosecuting environmental crimes in their districts, and ENRD's Environmental Crimes Section (ECS) is responsible for investigating and prosecuting environmental crimes on a nationwide basis. Cooperation and consultation between the USAOs and ECS can make the most effective use of the Department's resources. ECS will continue to seek the involvement of USAOs in environmental criminal cases.

Regardless of whether a USAO helps to pursue a particular case, the USAO often can provide valuable insights and advice on local practice, local judicial preferences, sensitivities, and interests.

Enforcement Principle #8
Respect the Rights of Our Citizens and Consider the Impacts of Investigations.

In November 2018, then-Deputy Attorney General Rod Rosenstein announced revised Department policy, continuing the focus on pursuing individuals responsible for wrongdoing as a top priority in every corporate investigation.²⁰ Under this policy, the Department clarified that companies seeking cooperation must identify all individuals who were substantially involved in or responsible for the misconduct. Nevertheless, a company continues not to be required to waive its attorney-client privilege or attorney work product protection to be eligible to receive cooperation credit. J.M. 9-28.700.A. The disclosure required is of the relevant facts. *Id.* 9-28.720. Therefore, attorneys must continue to be sensitive to not, "either wittingly or unwittingly" take actions that

²⁰ Remarks of Rod J. Rosenstein, Deputy Attorney General of the United States, Oxon Hill, MD (Nov. 29, 2018), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

“coerce business entities into waiving attorney-client privilege and work-product protection,” *id.* § 710, but recognize that the presence of facts that can be segregated does not require the disclosure of work product mixed with attorney analysis to warrant cooperation.

Moreover, thorough investigations can take time. Nevertheless, even the existence (or perceived existence) of criminal and civil investigations can impose costs and other burdens on a target. Those include not just internal uncertainty, but market uncertainty for a business entity when, for example, a publicly traded target has disclosed perceived existence of a government investigation in public financial statements. ENRD should seek to ameliorate such impacts when, consistent with ENRD’s other principles and priorities, an attorney determines to discontinue an investigation of an entity that was previously notified it was a target of an investigation. *See, e.g.*, JM 4-3.300, 4-3.320. ENRD attorneys who have communicated the existence of an investigation to a potential defendant should take steps to formally close the matter. Absent compelling reasons not to, such formal closure and documentation should occur within one year after the work concludes. ENRD’s closure of an investigation should then be promptly communicated to the target, reserving, as appropriate, the Department’s authority to reopen investigations.

ENRD ENFORCEMENT PRIORITIES

Our Division has continued to follow the law and the facts of each particular case and, consistent with sound principles of enforcement discretion, seeks to enforce violations of federal law within its jurisdiction. The Division must also take action to advance the enforcement priorities identified by the Executive Branch, which periodically adjust from one administration to another. The following five priorities have been receiving particular attention and dedication of resources within the Division from 2018-2021.

Enforcement Priority #1 Focus on Achieving Tangible Results, Such as Clean Water, Clean Air, and Clean Land.

ENRD should prioritize enforcement actions that provide concrete environmental benefits for clean water, clean air, and clean land. Pursuit of such pollution-oriented cases aligns tightly with EPA’s priorities, and EPA refers most cases of this nature to ENRD. These cases often have as a leading objective protecting the health of our citizens. Cases in this category arise principally, but not exclusively, under CERCLA (particularly cases addressing significant contamination²¹), the Oil Pollution Act (OPA), the Resource Conservation and Recovery Act (RCRA), the Clean Air Act (particularly in areas with more acute air pollution problems), the Clean Water Act (CWA) (particularly pollution of impaired water bodies), and the Safe Drinking Water Act.

²¹ For instance, in April 2020, EPA developed a list of 15 “Superfund Sites Targeted for Immediate, Intense Action” that EPA has identified as, among other things, “requiring timely resolution of specific issues to expedite cleanup and redevelopment efforts [and] ... to spur action at sites where opportunities exist to act quickly and comprehensively.”

This approach supports prioritization for time-sensitive incidents that require rapid action to protect human health or the environment or to preserve the United States' claims. EPA, for example, has focused on reducing lead contamination, in light of its potentially devastating effects on human health, especially on children. In December 2018, the EPA issued its *Federal Action Plan to Reduce Childhood Lead Exposures and Associated Health Impacts* for reducing lead exposure and associated harms in children through collaboration among federal agencies and with a range of stakeholders, including States, tribes and local communities, along with businesses, property owners and parents.²² Children can be exposed to lead by many pathways: ingestion of lead paint in buildings or lead wastes found out-of-doors, and even from contaminated drinking water. These exposures may form the basis for federal enforcement under various statutes (for example, CERCLA, RCRA, CWA, Safe Drinking Water Act). Where referrals include agency-priority issues of this kind, ENRD also will look to prioritize action on those referrals.

The Division also supports federal agencies in their stewardship of our nation's finite resources and public lands. Harm to those resources undermines their value both for current productive use and enjoyment and for future generations. For example, illegal fishing harms the livelihoods of our nation's fishing industry, which depends on the existence of well-managed fisheries; illegal trafficking in wildlife affects populations of wildlife that have recreational and scientific value; and pollution of our nation's oceans with oil and other pollutants impairs the ability of those waters to support economic and recreational activities. Proper enforcement of federal law also helps to ensure that businesses and others who depend on public lands and resources are competing on a level playing field, rather than in a marketplace weakened by illegal conduct.

Generally, where referring agencies prioritize types of violations, ENRD will likewise seek to pursue them.

Enforcement Priority #2 Maintain the Integrity of Environmental Programs.

Effective environmental enforcement requires attention to the totality of the regime that Congress established. Many environmental statutes, such as the Clean Air Act and Clean Water Act, depend on self-monitoring and self-reporting by regulated entities (typically as a condition of a permit) to evaluate compliance with the law, identify environmental problems before they reach critical proportions, gather data essential to protecting the environment, and promote an overall culture of compliance. Given the centrality of these requirements to the proper functioning of the overall statutory regimes, enforcing monitoring and reporting requirements, including against those who violate the public trust through false reporting, is critical to achieving the law's objectives. ENRD plays an important role in rooting out and bringing enforcement actions against those who would undermine the integrity of environmental programs and the public's trust in them. Two examples of this enforcement priority are ENRD's cases involving misrepresentation and fraud in EPA's Renewable Fuel Standard program or other market-based credit programs and ENRD's

²² *Federal Action Plan to Reduce Childhood Lead Exposures and Associated Health Impacts*, President's Task Force on Environmental Health Risks and Safety Risks to Children (Dec. 2018).

cases enforcing against defeat devices that cheat on emissions testing requirements of the Clean Air Act mobile source program.

**Enforcement Priority #3
Fight Fraud & Recover Taxpayer Funds.**

ENRD should prioritize cases involving violations of the public trust or fraud against the United States, including cases for potential criminal enforcement involving deliberate or intentional wrongdoing in these contexts, as well as cases that involve recovery of costs expended by the federal treasury (such as CERCLA and OPA cost recovery actions). In these cases, the Division will seek to secure restitution both for the federal fisc and, where possible under applicable law, for consumers, affected natural resources, and others who have been affected by the violation.

**Enforcement Priority #4
Combat Violent and/or Organized Crime.**

ENRD should give due attention to cases with a connection to violent or organized crime, as has been seen in the area of illegal wildlife trafficking, ENRD's work enforcing federal laws against criminal animal fighting ventures, and illegal drug activities on public lands. While not traditionally a central focus of our Division's work, these offenses may be classified as *malum in se* and therefore are an appropriate focus of the Division's attention and limited resources.

**Enforcement Priority #5
Protect America's Workers, Competitiveness, and Infrastructure.**

ENRD should prioritize cases that protect these vital American interests. ENRD should pursue cases that further ENRD's responsibilities to protect the safety of American workers and to protect the economic competitiveness of American labor and products. This includes giving due attention to cases involving workplace safety as well as cases involving illegally sourced imports (for example, timber products, seafood, etc.). ENRD should also give due attention to efforts, in coordination with other Department components, to investigate and prosecute, where justified, acts of sabotage or damage against domestic energy pipelines and other critical infrastructure, which can both endanger human life and harm the environment.

CONCLUSION

ENRD's mission to protect the nation's environment and natural resources touches the lives of all Americans. Over the years, the Division's enforcement actions have vindicated the rule of law, eliminated thousands of tons of harmful air pollution, improved water quality in communities throughout the country, and cleaned up contaminated lands. The Division has also obtained countless convictions of criminals engaged in knowing violations of environmental laws, including unlawful wildlife trafficking, dumping, and fraud. As the unparalleled attorneys and staff of ENRD continue this important mission, we must keep at the forefront our obligation to the impartial rule of law, due process, fairness and consistency, federalism, pragmatic decision-making, and the other fundamental principles and priorities outlined in this memorandum. We must never lose sight of our higher calling to ensure that justice is done our citizens in the courts.

ENRD's leadership stands ready to answer any questions that might arise concerning this memorandum.²³

CC: ENRD Deputy Assistant Attorneys General
Chief of Staff

²³ This memorandum supersedes and replaces the Enforcement Principles and Priorities memorandum from Acting Assistant Attorney General Jeffrey H. Wood dated March 12, 2018.